Chapter 8
Criminal Court Proceedings Involving Domestic Violence

In this Chapter...

Because domestic violence typically includes criminal behavior, it is not unusual to find criminal court proceedings pending simultaneously with domestic relations proceedings in cases where domestic violence is involved. These situations present unique concerns for victim safety and abuser accountability. In some Michigan jurisdictions, Friend of the Court personnel meet with criminal court personnel and representatives from law enforcement agencies to address the case management issues in these cases in a coordinated fashion. Friend of the Court personnel can best respond to the challenges of concurrent court actions if they are familiar with some of the basic features of criminal proceedings. The first part of this chapter will provide information about domestic assault, stalking, and parental kidnapping, crimes that often occur in situations where domestic violence is present. The second part of this chapter will discuss certain procedures and orders in criminal court proceedings that may have an impact upon domestic relations proceedings in the family division of circuit court.

Part I — Elements of Common Domestic Violence Crimes

8.1 Domestic Violence Crimes Generally

As discussed in Section 1.6, domestic abusers employ a wide variety of tactics to maintain control over their victims. Accordingly, criminal behavior in situations involving domestic violence may take many forms so that any

crime can be a "domestic violence crime" if perpetrated as a means of controlling an intimate partner. "Domestic violence crimes" may be directed against the person, property, animals, family members, or associates of the abuser's intimate partner. Domestic violence crimes under Michigan law may include:

- Assault and battery.
- Child abuse.
- Firearms offenses.
- Kidnapping, including parental kidnapping.
- Criminal sexual conduct.
- Mayhem.
- Stalking.
- Cruelty to animals.
- Arson.
- Breaking and entering.
- Home invasion.
- Malicious destruction of property.
- Desertion and non-support of children.
- Trespassing.

Some of these crimes (e.g., stalking, kidnapping, animal abuse) may be associated with a high risk of lethality. See Section 1.5(B) on lethality in situations where domestic violence is present.

A discussion of each crime listed above is beyond the scope of this resource book. However, Sections 8.2–8.5 will address the criminal statutes governing domestic assault, stalking, and parental kidnapping, three types of crime that commonly arise in situations involving domestic violence. For information on other Michigan criminal offenses that are likely to arise from domestic abuse situations, see Lovik, *Domestic Violence: A Guide to Civil and Criminal Proceedings* (*3d ed*) (MJI, 2004), Section 2.7.*

*See also Chapter 7 of this resource book on personal protection orders. A PPO is a civil order, the violation of which is subject to criminal contempt sanctions.

Note: In the Violence Against Women Act, the U.S. Congress created three federal domestic violence crimes that are beyond the scope of this resource book. These offenses are:

- Crossing a state line or entering or leaving Indian country with the intent to injure, harass, or intimidate a spouse or intimate partner and thereby committing a crime of violence that causes that person bodily injury. 18 USC 2261.
- Traveling across a state line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person and thereby placing that person in

reasonable fear of death or serious bodily injury to him/herself or to a member of his/her immediate family. 18 USC 2261A.

– Traveling in Interstate or foreign commerce or entering or leaving Indian country to violation a protection order. 18 USC 2262.

8.2 Domestic Assault

A. Elements of Offense; Penalties for First-Time Offenders

Assault and battery is a crime in Michigan regardless of the relationship between the assailant and victim. MCL 750.81 generally governs this misdemeanor offense. In subsections (2) to (4), the statute contains special penalty provisions for situations where the victim has one of the following relationships with the assailant:

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 750.81(6).
- The victim is a resident or former resident of the same household as the assailant.

To promote safety in situations where an assailant and victim have one of the foregoing domestic relationships, the Legislature has authorized police to arrest individuals without a warrant for assault or assault and battery in violation of MCL 750.81(2) or any local ordinance substantially corresponding to MCL 750.81(2) if the arresting officer has reasonable cause to believe that the violation occurred or is occurring. Officers may make a warrantless arrest for domestic assault regardless of whether the violation occurred in their presence. MCL 764.15a.

Upon conviction of domestic assault or assault and battery under MCL 750.81(2), an offender with no prior assault convictions is subject to misdemeanor sanctions as follows:

- Not more than 93 days imprisonment; and/or,
- A maximum $500.00 fine.

First-time offenders may also be eligible for deferred proceedings under MCL 769.4a, discussed in Section 8.9(B).

The Michigan Court of Appeals has addressed who may be included as a resident within the same household under the domestic assault statute. In *In re Lovell*, 226 Mich App 84 (1997), the prosecutor filed a petition in probate

court charging a 16-year old girl with battering her mother under MCL 750.81(2). The probate court refused to issue the petition, holding that the statute did not apply to assaults by children against parents. The prosecutor appealed to the circuit court, which also affirmed. The Court of Appeals reversed the lower courts' decision, holding that:

> "When a statute is clear and unambiguous, judicial interpretation is precluded . . . . Courts may not speculate regarding the probate intent of the Legislature beyond the words expressed in the statute . . . . [The statute] applies to offenders who resided in a household with the victim at or before the time of the assault . . . regardless of the victim's relationship with the offender." 226 Mich App at 87-88.

B. Enhanced Penalties for Repeated Offenders

*There is no statutory requirement that the victim involved in the prior conviction be the same person as the victim of the current offense.

The penalties for domestic assault as defined in MCL 750.81(2) are enhanced for individuals who violate that statute after a previous conviction of certain other assaultive offenses. If the prior conviction involved a crime listed in MCL 750.81(3)–(4), and that prior conviction was committed against the assailant's spouse or former spouse, a person with whom the assailant has or has had a dating relationship, a person with whom the assailant has had a child in common, or a resident or former resident of the assailant's household,* the penalties for the current offense will be enhanced as follows:

- Offenders with a single prior conviction "may be punished by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both." MCL 750.81(3).
- Offenders with two or more prior convictions are "guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,500.00, or both." MCL 750.81(4).

The prior offenses that result in enhanced penalties under MCL 750.81(3)–(4) are:

- A violation of MCL 750.81 (assault);
- A violation of MCL 750.81a (assault and infliction of serious injury);*
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder);
- A violation of MCL 750.86 (assault with intent to maim);
- A violation of a local ordinance substantially corresponding to MCL 750.81; or
- A violation of a law of another state or a local ordinance of another state that substantially corresponds to any of the above statutes.

*This offense is discussed at Section 8.3.

8.3 Domestic Assault and Infliction of Serious Injury

MCL 750.81a(1) punishes "a person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder." The Criminal Jury Instructions define a "serious or aggravated injury" as "a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body." CJI2d 17.6(4).

Assault and infliction of serious injury (or "aggravated assault") is a crime in Michigan regardless of the relationship between the assailant and victim. As is the case with assault and assault and battery,* MCL 750.81a(2) and (3) contain special penalty provisions for aggravated assault where the victim has one of four types of relationships with the assailant:

*See Section 8.2 on assault and assault and battery.

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 750.81a(4).
- The victim is a resident or former resident of the same household as the assailant. The Michigan Court of Appeals has held that a 16-year-old child who assaulted a parent was a "resident of the same household" for purposes of the domestic assault statute, MCL 750.81(2) and *In re Lovell,* 226 Mich App 84, 87–88 (1997).

If an assailant and victim have one of these four types of domestic relationships with the assailant, the Legislature has authorized police to arrest the assailant without a warrant for assault and infliction of serious injury in violation of MCL 750.81a(2), if the arresting officer has reasonable cause to believe that the violation occurred or is occurring. Officers may make a warrantless arrest regardless of whether the violation occurred in their presence. MCL 764.15a.

Upon conviction of domestic assault and infliction of serious injury under MCL 750.81a(2), an offender with no prior assault convictions is subject to the following penalties:

- Misdemeanor sanctions of imprisonment for not more than one year; and/or
- A fine of not more than $1,000.00.

First-time offenders may also be eligible for deferred proceedings under MCL 769.4a, discussed in Section 8.9(B).

Enhanced penalties apply if an assailant convicted of assault and infliction of serious injury has a prior conviction of one or more of the crimes listed in the statute, *and* the prior victim was a person with whom the offender had one of the four domestic relationships listed above. In this case, the offender is guilty of a felony punishable by imprisonment for not more than two years and/or a fine of not more than $2,500.00 The victims of the current and prior offenses need not be the same person for enhanced penalties to apply. MCL 750.81a(3).

MCL 750.81a(3) lists the prior offenses that result in enhanced penalties:

- A violation of MCL 750.81a (domestic assault and infliction of serious injury);
- A violation of MCL 750.81 (domestic assault or assault and battery);
- A violation of MCL 750.82 (felonious assault);
- A violation of MCL 750.83 (assault with intent to commit murder);
- A violation of MCL 750.84 (assault with intent to do great bodily harm less than murder);
- A violation of MCL 750.86 (assault with intent to maim);
- A violation of a local ordinance substantially corresponding to MCL 750.81a; or
- A violation of a law or local ordinance or another state substantially corresponding to one of the above enumerated crimes.

8.4 Stalking

*Adams, *Identifying the Assaultive Husband in Court: You Be the Judge,* Boston Bar J 23, 24 (July/August, 1989).

Stalking — the willful, repeated harassment of another person — does not necessarily involve parties who are in a domestic relationship. Nonetheless, this resource book includes a discussion of stalking, because domestic abusers often stalk their victims. Stalking behavior in a domestic relationship may arise from the abuser's obsessive jealousy or possessiveness of the victim. A jealous, possessive abuser may constantly monitor a partner's activities. When the victim leaves or attempts to leave the relationship, the abuser may refuse to accept the end of the relationship and continue or escalate surveillance.* The abuser may subject the victim to ongoing harassment and pressure tactics, including multiple phone calls, homicide or suicide threats, uninvited visits at home or work, and manipulation of children.

*See Section 1.5(B) for discussion of factors indicating potential lethality.

Abusers who stalk may be prepared to kill the victim rather than relinquish control over the victim's life. Thus, stalking behavior is a significant indicator of an abuser's potential lethality, particularly if it escalates in severity or increases in frequency when the victim attempts to leave the relationship or seeks court intervention to end the abuse. Prompt action to protect the victim is necessary when abusive behavior exhibits any signs of potential lethality.*

The Michigan Legislature has provided criminal penalties for stalking in MCL 750.411h (misdemeanor stalking), and MCL 750.411i (aggravated

stalking). The rest of this section outlines the elements of these crimes, the applicable penalties, and defenses to prosecution that have been addressed in Michigan's appellate courts.

Note: In addition to the criminal stalking statutes, the Michigan Legislature has created two civil remedies for stalking victims:

- A personal protection order against stalking, pursuant to MCL 600.2950a. See Chapter 7 for discussion of PPOs.
- A civil action for damages against a stalker, pursuant to MCL 600.2954. For discussion, see Lovik, *Domestic Violence: A Guide to Civil and Criminal Proceedings* (*3d ed*) (MJI, 2004), Section 3.6.

A. Misdemeanor Stalking

1. Elements of Stalking

"Stalking" is a criminal misdemeanor under MCL 750.411h. In subsection (1)(d), the statute defines stalking as follows:

- "[A] willful course of conduct involving repeated or continuing *harassment* of another individual";
- "[T]hat would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested"; and
- "[T]hat actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

The following definitions further explain this offense

- A "course of conduct" involves a series of 2 or more separate, noncontinuous acts evidencing a continuity of purpose. MCL 750.411h(1)(a). See *Poboursky v Gee*, 249 Mich App 44, 47-48 (2001).
- "Harassment" means conduct directed toward a victim that includes, but is not limited to, "repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct serving a legitimate purpose." MCL 750.411h(1)(c).
- "Emotional distress" means "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b).
- Under MCL 750.411h(1)(e), "unconsented contact" means "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." Unconsented contact includes, but is not limited to:
  - Following or appearing within the victim's sight.

- Approaching or confronting the victim in a public place or on private property.
- Appearing at the victim's workplace or residence.
- Entering onto or remaining on property owned, leased, or occupied by the victim.
- Contacting the victim by phone, mail, or electronic communications.
- Placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.

Note: A stalker's contacts with the victim may be both consented and unconsented. For example, a victim may consent to telephone calls from a former spouse to arrange for parenting time without consenting to the former spouse's appearance at his or her workplace. In these cases, the court might distinguish consented from unconsented contact and inquire whether the unconsented contact meets the requirements of the stalking statute.

In a criminal prosecution for stalking, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after the victim requested the defendant to cease doing so raises a rebuttable presumption that the continued contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. MCL 750.411h(4).

The crime of stalking does not require the victim and the perpetrator to have a prior domestic relationship. Nonetheless, the prosecution may choose to charge a defendant with stalking in domestic situations where:

- The elements for other domestic violence crimes cannot be proved; or
- The separate acts constituting the stalking behavior are less serious when considered as individual criminal acts than they are when considered cumulatively.

2. Penalties for Misdemeanor Stalking

*For restitution from juvenile offenders, see MCL 780.794.

Except in cases where the victim is less than 18 years of age at any time during the offense and the offender is five or more years older than the victim, misdemeanor stalking is punishable by imprisonment for not more than one year and/or a fine of not more than $1,000.00. MCL 750.411h(2)(a). Additionally, victims of misdemeanor stalking are entitled to restitution from the defendant under MCL 780.826.*

*MCL 771.2a(1) makes similar provision for probation in stalking cases.

Under MCL 750.411h(3), the court may place the offender on probation for a term of not more than five years.* If the court orders probation, it may impose any lawful condition of probation, and in addition, may order the offender to:

- Refrain from stalking any individual during the term of probation;
- Refrain from having any contact with the victim of the offense; or

- Be evaluated to determine the need for psychiatric, psychological, or social counseling and to receive such counseling at his or her own expense.

MCL 750.411h(2)(b) provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, stalking is a felony punishable by imprisonment for not more than five years or a fine of not more than $10,000.00, or both.

B. Felony Aggravated Stalking

1. Elements of Aggravated Stalking

The aggravated stalking statute, MCL 750.411i(1), contains the same definition of "stalking" as found in the misdemeanor stalking statute, MCL 750.411h(1).* However, an offender's behavior becomes felony aggravated stalking if the violation also involves any of the following circumstances set forth in MCL 750.411i(2):

*See Section 8.4(A) on this definition.

- At least one of the actions constituting the offense is in violation of a restraining order of which the offender has actual notice, or at least one of the actions is in violation of an injunction or preliminary injunction. "Actual notice" is not defined in MCL 750.411i. *In People v Threatt*, 254 Mich App 504, 506-507 (2002), the Michigan Court of Appeals held that actual notice does not mean service. Knowledge of the restraining order constitutes actual notice. There is no language in the aggravated stalking statute stating that the order violated must have been issued by a Michigan court — violations of sister state or tribal orders may also result in aggravated stalking charges.
- At least one of the actions constituting the offense is in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal.
- The person's conduct includes making one or more credible threats against the victim, a family member of the victim, or another person living in the victim's household. A "credible threat" is a threat to kill or to inflict physical injury on another person, made so that it causes the person hearing the threat to reasonably fear for his/her own safety, or for the safety of another. MCL 750.411i(1)(b).
- The offender has been previously convicted of violating either of the criminal stalking statutes.

2. Penalties for Aggravated Stalking

Except in cases where the victim is less than 18 years of age at any time during the offense and the offender is five or more years older than the victim, aggravated stalking is punishable by:

- Imprisonment for not more than five years or a fine of not more than $10,000.00, or both. MCL 750.411i(3)(a).

- Probation for any term of years, but not less than five years.* MCL 750.411i(4). If it orders probation, the court may impose any lawful condition and may additionally order the offender to:
  - Refrain from stalking any individual during the term of probation;
  - Refrain from any contact with the victim of the offense; or
  - Be evaluated to determine the need for psychiatric, psychological, or social counseling and to receive such counseling at his or her own expense.

*MCL 771.2a(2) makes similar provision for probation in stalking cases.

Additionally, victims of aggravated stalking are entitled to restitution from the defendant under MCL 780.766.*

*For juvenile offenders, see MCL 780.794.

MCL 750.411i(3)(b) provides for enhanced penalties where the victim is less than 18 years of age at any time during the offender's course of conduct, and the offender is five or more years older than the victim. In such cases, aggravated stalking is punishable by imprisonment for not more than ten years or a fine of not more than $15,000.00, or both.

C. Defenses to Stalking

MCL 750.411h(1)(c) creates defenses to stalking for "**conduct that serves a legitimate purpose**" or "**constitutionally protected activity**." A similar defense exists under the aggravated stalking statute, MCL 750.411i(1)(d).

1. Legitimate Purpose Defense

The Michigan Court of Appeals addressed the legitimate purpose defense in the following case.

- *People v Coones*, 216 Mich App 721, 725–726 (1996):

  The Michigan Court of Appeals found that the defendant was not entitled to a jury instruction on the "legitimate purpose" defense under the aggravated stalking statute, despite his assertions that contact with his estranged wife was made for the purpose of preserving their marriage. Defendant forcibly entered his wife's residence in violation of a restraining order against him. Given this illegitimate conduct on defendant's part, his "ends justifies the means" argument did not require the trial court to instruct the jury on "legitimate purpose" under the statute.

2. Constitutionally Protected Activity

The Michigan Court of Appeals upheld the stalking statute over a constitutional challenge based on vagueness and overbreadth:

- *People v White*, 212 Mich App 298, 308–313 (1995):

  After his victim ended her dating relationship with him, the defendant continuously stalked his victim from September 1992, through August 1993, making hundreds of telephone calls to her home and workplace, threatening to kill her and her family members. After his arrest, defendant

pled guilty to misdemeanor stalking in violation of a township ordinance substantially similar to the state misdemeanor statute. Defendant also pled guilty to attempted aggravated stalking under the state statute and to habitual offender-third. On appeal from his conviction, defendant asserted that the stalking statutes were unconstitutionally vague and that they abridged his First Amendment right to free speech by permitting the complainant to determine subjectively which telephone calls were acceptable and which were criminal.

The Court of Appeals rejected defendant's challenge to the statutes. The Court stated that a statute may be challenged for vagueness if it: 1) is overbroad, impinging on First Amendment rights; 2) does not provide fair notice of the conduct proscribed; or 3) confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. 212 Mich App at 309. Applying these standards, the Court held that the Michigan criminal stalking statutes were not unconstitutionally vague. The Court reasoned as follows:

- The stalking statutes are not overbroad and do not impinge on the defendant's constitutional right to free speech. The statutes specifically exclude constitutionally protected speech, addressing instead a willful pattern of unconsented conduct — including conduct combined with speech — that would cause distress to a reasonable person. Defendant's repeated verbal threats to kill the victim and members of her family were neither protected speech nor conduct serving a "legitimate purpose" of reconciliation. 212 Mich App at 310–311.

- The stalking laws provide fair notice of the proscribed conduct. The U.S. Supreme Court has stated that "the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v Lawson*, 461 US 352, 357 (1983). Here, a person of reasonable intelligence would not need to guess at the meaning of the stalking statutes. The definitions of crucial words and phrases in the statutes are clear and understandable to a reasonable person reading the statute. Also, the meaning of the words used in the statutes can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the words themselves because they possess a common and generally accepted meaning. 212 Mich App at 312.

- Finally, the Court of Appeals determined that the trial court's discretion to decide whether the complainant receives a series of contacts in a positive or a negative fashion does not render the statutes vague. The Court of Appeals held that vagueness can only be established if the wording of the statute itself is vague. 212 Mich App at 313.

*28 USC 2254(a) authorizes a federal court to grant a writ of habeas corpus to state prisoners if they are held "in custody in violation of the Constitution or laws or treaties of the United States."

The U.S. Court of Appeals for the Sixth Circuit revisited the issues decided in *People v White, supra*, in *Staley v Jones,* 239 F3d 769 (CA 6, 2001). The defendant in *Staley* filed a petition for a writ of habeas corpus under 28 USC 2254 in the U.S. District Court for the Western District of Michigan, after the Michigan Supreme Court denied leave to appeal from his conviction of aggravated stalking under MCL 750.411i.* Although it found that the conduct giving rise to the defendant's conviction clearly fell within the scope of conduct that could constitutionally be penalized under the stalking statute, the federal district court nonetheless granted the petition, opining that the statute was overbroad and vague on its face. The district court reasoned that the state court in *White, supra,* had so limited the statutory exclusions for "constitutionally protected activities" and "conduct that serves a legitimate purpose" that the statute could be unconstitutionally applied to protected First Amendment conduct. In support of its decision, the district court cited the following language from *White*:

> "Both §411h(1)(c) and §411i(1)(d) state that '[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose,' *and such protected activity or conduct has been defined as labor picketing or other organized protests*." 212 Mich App at 310 [citation omitted; emphasis added].

From the foregoing language, the district court concluded that the Court of Appeals in *White* intended to limit the statutory exclusions to the two instances mentioned, namely, to labor picketing and other organized protests. Based on this conclusion, the district court found the stalking statute at odds with the First Amendment, because it could criminalize protected speech by such individuals as persistent news reporters or salespersons who cause emotional distress. *Staley v Jones,* 108 F Supp 2d 777, 784-788 (WD Mich, 2000). The district court further stated that if it had not found the statute inconsistent with First Amendment protections, it would have found it unconstitutionally vague because it provides no guidance as to what constitutes a "legitimate purpose." *Id*. at 786 n 4.

The U.S. Court of Appeals for the Sixth Circuit reversed the district court's grant of the habeas corpus petition, finding, among other things, that the district court had misinterpreted the controlling state precedent set forth in *White.* The appellate panel found that the *White* court's reference to labor picketing and other organized protests was meant to be illustrative of protected activities; the panel found "no indication" that the *White* court meant this reference to constitute an exhaustive list. 239 F3d at 783. This misreading of *White* "improperly colored" the district court's analysis of the overbreadth issue. *Id.*

The Sixth Circuit further rejected defendant's assertions that the Michigan Court of Appeals had unreasonably applied federal law in upholding the aggravated stalking statute over his constitutional challenges to them.* With respect to the defendant's challenge on overbreadth grounds, the Sixth Circuit panel held that the *White* court's application of federal law as set forth in *Broadrick v Oklahoma,* 413 US 601 (1973) was a reasonable application of federal law:

*28 USC 2254(d)(1) requires the federal court in a habeas corpus proceeding to determine whether the state court's decision is contrary to, or an unreasonable application of, federal law.

> "In short, even if the state court of appeals wrongly assessed the First Amendment implications in relation to the statute's legitimate reach (and we do not think it did), it cannot be said that the *White* court's application of *Broadrick* was unreasonable. As the Michigan Court of Appeals recognized, the thrust of this statute is proscribing unprotected conduct. Furthermore, any effect on protected speech is marginal when weighed against the plainly legitimate sweep of the statute, and certainly does not warrant facial invalidation of the statute . . . . Simply stated, it was not unreasonable for the state court to reject Staley's overbreadth challenge." 239 F3d at 787.

With respect to the defendant's assertions that the statute was vague, the Sixth Circuit panel stated:

> "The state court's conclusion that the Michigan stalking law gives fair notice of what conduct is proscribed is not directly contrary to [U.S.] Supreme Court precedent or an unreasonable application of it . . . . The exclusion for 'conduct that serves a legitimate purpose' is . . . not defined. But this does not transform an otherwise unambiguous statute into a vague one. As the *White* court noted, a person of reasonable intelligence would know whether his conduct was violating the statute." 239 F3d at 791.

The Sixth Circuit's opinion in the *Staley* case also discusses at length the circumstances under which a facial challenge to a statute may be made by someone to whom the statute may constitutionally be applied, a question that is beyond the scope of this discussion.

8.5 Parental Kidnapping

A. Elements of Parental Kidnapping; Penalties

Under Michigan law, parental kidnapping is a felony. MCL 750.350a(1) defines this offense as follows:

> "An adoptive or natural parent of a child shall not take that child, or retain that child for more than 24 hours, with the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or parenting time rights pursuant to a lawful

court order at the time of the taking or retention, or from the person or persons who have adopted the child, or from any other person having lawful charge of the child at the time of the taking or retention."

*See also CJI2d 19.6.

The elements of parental kidnapping are as follows:*

- The defendant must be an adoptive or natural parent of the child; and
- The defendant must have:
  - taken the child from a person having the lawful charge of the child at the time of the taking; or
  - retained the child for more than 24 hours beyond the time when the defendant should have returned the child to the person having the lawful charge of the child; and
- The defendant must have had the intent to detain or conceal the child from:
  - the person having lawful charge of the child at the time;
  - the parent or legal guardian who had custody or parenting time rights at the time; or
  - the person who had adopted the child.

A person convicted under the parental kidnapping statute is subject to imprisonment for not more than one year and one day and/or a maximum fine of $2,000.00. MCL 750.350a(2). Additionally, the court may order the offender to make restitution for any financial expense incurred as a result of attempting to locate and have the child returned. Restitution may be made to the child's other parent, legal guardian, adoptive parent, or to any other person with lawful charge of the child. MCL 750.350a(3). Offenders with no prior kidnapping convictions may be eligible for deferred proceedings under MCL 750.350a(4), discussed at Section 8.9(C).

It is possible to violate this statute in the absence of a court order. In *People v Reynolds*, 171 Mich App 349 (1988), the defendant took a child from a grandparent who was baby-sitting. Because the child was born out-of-wedlock, there was no custody or parenting time order governing the rights of the parents. Nonetheless, the Court of Appeals held that the defendant was criminally liable for taking the child from the grandparent, who had lawful charge of him as a baby-sitter at the time of the taking. 171 Mich App at 352-353.

It is also possible for a parent to be convicted under the statute without receiving formal notice of the court's order giving custody to the other parent. In *People v McBride*, 204 Mich App 678 (1994), the defendant was separated from his wife in September, 1991. On September 25, 1991, the circuit court entered an ex parte order granting his wife sole custody of their children. On October 17, 1991, the defendant absconded with the children to California. Although his wife had told him about the custody order prior to October 17, it was not served on him until after that date. The Court of Appeals held that

the failure of service did not prevent the district court from binding the defendant over for trial on criminal charges under the parental kidnapping statute. The panel noted that the statute contains no requirement that a parent be formally served with a custody order before he or she can be charged with parental kidnapping. It requires only that the parent from whom the child is taken have custody or parenting time rights pursuant to a lawful court order at the time of the taking or retention. 204 Mich App at 682.

The parental kidnapping statute applies to parents who retain a child in another jurisdiction after taking the child from Michigan. In *People v Harvey*, 174 Mich App 58 (1989), the defendant abducted a child from Michigan five years before the 1983 enactment of the parental kidnapping statute and detained her in Colorado until 1986. The Court of Appeals held that the defendant had violated MCL 750.350a and was subject to the jurisdiction of the Michigan courts. The panel stated: "Acts done outside a state which are intended to produce, and in fact do produce, detrimental effects within the state may properly be subject to the criminal jurisdiction of the courts of that state. The detrimental effects of defendant's intentional *retention* of the girl [after 1983] in violation of the Michigan court's custody order occurred here, in Michigan, since it was the authority of a Michigan court that was thwarted and it was the custodial right of a Michigan resident that was infringed upon." 174 Mich App at 61. [Emphasis added.]

B. Defenses to Parental Kidnapping

MCL 750.350a(5) provides an affirmative defense to parents who prove that they acted to protect the child "from an immediate and actual threat of physical or mental harm, abuse, or neglect." This defense applies on its face only to actions taken to prevent harm to the *child*. The statute does not mention situations in which the defendant *parent* is threatened with harm, abuse, or neglect.* As of the publication of this resource book, no Michigan appellate court has addressed the operation of this defense to parental kidnapping in a case involving a parent's flight from adult abuse. However, it is interesting to note a provision in the Child Custody Act, MCL 722.27a(6)(h), stating that a parent's temporary residence with a child in a domestic violence shelter does not amount to evidence of the parent's intent to conceal the child from the other parent for purposes of determining the frequency, duration, and type of parenting time.

*For discussion of the harmful effects of adult domestic violence on children, see Section 1.8(B).

In addition to the statutory affirmative defense, the common law defense of duress may apply in parental kidnapping cases. To establish duress, a defendant must show: 1) threatening conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm; 2) the conduct actually caused such fear in the defendant's mind; 3) the fear or duress was operating upon the mind of the defendant at the time of the alleged act; and 4) the defendant committed the act to avoid the threatened harm. *People v Luther*, 394 Mich 619, 623 (1975). The defendant has the burden of providing some evidence from which the jury can conclude that the defendant acted under duress. If the defendant meets this burden of production, then the prosecutor must prove beyond a reasonable doubt that the defendant was not acting under duress. If a defendant denies that the or she has committed a crime, that defendant is not entitled to a jury instruction on duress. *People v*

McKinney, 258 Mich App 157, 164 (2003) (defendant sought to prove that she lived with defendant out of fear but denied committing major controlled substance offenses). For a jury instruction and commentary on duress, see CJI2d 7.6.

> **Note:** For specific circumstances supporting a defense of duress, see MCL 768.21b(4), which lists six conditions for a jury to consider in deciding whether a defendant acted under duress in escaping from prison. These conditions are illuminating because they are similar to conditions that are present in many relationships involving domestic violence: 1) whether the defendant was faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future; 2) whether there was insufficient time for a complaint to the authorities; 3) whether there was a history of complaints by the defendant which failed to provide relief; 4) whether there was insufficient time or opportunity to resort to the courts; 5) whether force or violence was not used towards innocent persons in the escape; and 6) whether the defendant immediately reported to the proper authorities upon reaching a position of safety from the immediate threat.

Part II — Criminal Procedures That May Affect Domestic Relations Proceedings

8.6 Police Reporting Requirements

Police who investigate or intervene in "domestic violence incidents" are required by statute to prepare a standard domestic violence incident report form describing the incident. The law enforcement agency must keep a copy for its files and file a copy with the prosecuting attorney within 48 hours after an incident is reported. MCL 764.15c(2)–(3). Pursuant to MCL 764.15c(5)(b), a "domestic violence incident" involves allegations of one or both of the following:

*See Section 7.2 on domestic relationship PPOs.

- A violation of a domestic relationship PPO* issued under MCL 600.2950 or a valid foreign protection order. "Foreign protection order" means an injunction or other order issued by a court of another state, Indian tribe, or United States territory for the purpose of preventing a person's violent or threatening acts against, harassment of, contact with, communication with, or physical proximity to another person. Foreign protection order includes temporary and final orders issued by civil and criminal courts (other than a support or child custody order issued pursuant to state divorce and child custody laws, except to the extent that such an order is entitled to full faith and credit under other federal law), whether obtained by filing an independent action or by joining a claim to an action, if a civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection. MCL 764.15c(5)(c) and MCL 600.2950h(a). In order to be a "valid foreign protection order" the order must meet the requirements of MCL 600.2950i.*

- A crime committed by an individual against his or her spouse or former spouse, a person with whom the individual has a child in common, a person with whom the individual has or has had a dating relationship, or a person who resides or has resided in the same household with the individual. "Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affectional involvement. This term does not include a casual relationship or an ordinary fraternization between two individuals in a business or social context. MCL 764.15c(5)(a) and MCL 600.2950(30)(a).

Police reports prepared under MCL 764.15c may contain information of interest to the Friend of the Court in domestic relations proceedings. They can be obtained if they are attached to a complaint filed against the defendant by the prosecutor's office.* The criminal court will black out information concerning the victim, however.

*See Section 2.10(B)(2) for discussion of the contents of these reports.

8.7 Conditional Release on Bond Prior to Trial

Criminal defendants have a constitutional right to pretrial release on bond in most cases. The court may only deny bond to defendants charged with certain serious offenses (i.e., murder or certain violent felonies), "when the proof is evident or the presumption great." Const 1963, art 1, § 15. See Lovik, *Domestic Violence: A Guide to Civil and Criminal Proceedings* (*3d ed*) (MJI, 2004), Section 4.13, on the circumstances when the court may deny bond.

In issuing bond in cases involving domestic violence, criminal courts are cognizant of the increased risk of re-offense or obstruction of justice during the period between arrest and trial. Domestic violence victims are at increased risk during this time because the alleged perpetrator has greater access to them than does a perpetrator of stranger violence.* Moreover, because domestic violence is motivated by the abuser's desire to control the victim, a domestic violence perpetrator may resort to violence after arrest to regain the control that is lost when criminal charges are pending.

*Herrell & Hoford, *Family Violence: Improving Court Practice*, 41 Juvenile & Family Court J 32 (1990).

To protect crime victims and the public during the period of time between a criminal defendant's arrest and trial and to ensure the defendant's appearance at trial, courts are authorized to issue pretrial release orders with conditions that prohibit or require specified actions by the defendant. For the safety of domestic violence crime victims, it is most important for Friend of the Court personnel to be informed about pretrial release conditions that another court may have imposed in a criminal case that is pending concurrently with a domestic relations case.

A. Criminal Court's Authority to Issue Conditional Release Orders

To enhance safety in a case with allegations of domestic violence, the court has two sources of authority to issue pretrial release conditions in criminal cases. The court can issue its order for conditional pretrial release under **MCL 765.6b**, using SCAO Form MC 240, which is based on that statute. The SCAO form can be found online at www.courts.michigan.gov/scao/

courtforms. (Last visited March 22, 2004.) MCL 765.6b permits the court to impose such conditions as are "reasonably necessary for the protection of 1 or more named persons." Release orders issued under this statute protect crime victims because they can be expeditiously enforced. Orders under the statute are entered into the Law Enforcement Information Network ("LEIN") system and law enforcement officers have statutory authority to make a warrantless arrest upon reasonable cause to believe that the defendant is violating or has violated a condition of release. MCL 764.15e.

Release conditions may also be imposed under **MCR 6.106**. Orders issued under the sole authority of the court rule do not offer domestic violence victims the same protections as orders issued under MCL 765.6b. Orders issued under the court rule are not entered into the LEIN system and the police have no authority to make a warrantless arrest for violation of a release condition. For this reason, issuance of conditional pretrial release orders under the statute is the better practice in criminal cases involving domestic violence. It is important to note, however, that the court will apply MCR 6.106 in addition to the statutory criteria in determining release conditions for the protection of a named person under MCL 765.6b.

B. Factors Courts Consider in Issuing Release Conditions

MCL 765.6b does not specify factors for the court to consider in determining what conditions are "reasonably necessary" to protect a person from further assault by the defendant. However, MCR 6.106(D) states that the court may impose conditions on pretrial release to "ensure appearance of the defendant," or to "reasonably ensure the safety of the public." MCR 6.106(F)(1) provides that the court should consider "relevant information" in making its release decision. Under MCR 6.106(F)(1), "relevant information" includes:

> "(a) defendant's prior criminal record, including juvenile offenses;
>
> "(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;
>
> "(c) defendant's history of substance abuse or addiction;
>
> "(d) defendant's mental condition, including character and reputation for dangerousness;
>
> "(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;
>
> "(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;
>
> "(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

"(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and

"(i) *any other facts bearing on the risk of nonappearance or danger to the public.*" [Emphasis added.]

C. Contents of Conditional Release Orders

The court has broad authority to impose conditions of release under MCL 765.6b and MCR 6.106.

Under MCL 765.6b(2), the court's order (or amended order) for conditional release must contain:

- Defendant's full name;
- Defendant's height, weight, race, sex, birth date, hair color, eye color, and any other appropriate identifying information;
- A statement of the effective date of the conditions;
- A statement of the order's expiration date; and
- A statement of the conditions imposed.

In conjunction with MCL 765.6b, MCR 6.106(D) further gives the court broad authority to impose any conditions or combination of conditions it determines are necessary to "reasonably ensure the appearance of the defendant as required, or . . . the safety of the public."* MCR 6.106(D)(1) requires conditional release orders to provide that:

*Under MCL 765.6b, the court may also impose release conditions for the protection of a named person. See Section 8.7(A).

- The defendant will appear as required;
- The defendant will not leave the state without permission of the court; and
- The defendant will not commit any crime while released.

Additionally, MCR 6.106(D)(2) contains a lengthy, nonexclusive list of other specific conditions that the court may impose:

"(a) make reports to a court agency as are specified by the court or the agency;

"(b) not use alcohol or illicitly use any controlled substance;

"(c) participate in a substance abuse testing or monitoring program;

"(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

"(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

"(f) surrender driver's license or passport;

"(g) comply with a specified curfew;

"(h) continue to seek employment;

"(i) continue or begin an educational program;

"(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

"(k) not possess a firearm or other dangerous weapon;*

*The court may also impose a prohibition on the defendant's purchase or possession of a firearm under MCL 765.6b(3).

"(*l*) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;

"(m) satisfy any injunctive order made a condition of release; or

"(n) comply with any other condition, including the requirement of money bail . . . reasonably necessary to ensure the defendant's appearance as required and the safety of the public."

D. Duration of Conditional Release Orders

Under MCL 765.6b(2), the court's conditional release order (or amended order) must contain a statement of the order's expiration date. The duration of the release order is within the court's discretion and court practices differ in this regard. For example, some courts issue orders of six months' duration in misdemeanor cases and one year's duration in felony cases. Other courts specify a one-year duration for release orders in all cases. The order should at least be of sufficient duration to cover the time needed to complete proceedings in the issuing court. In felony cases, six months is usually sufficient time to complete preliminary examination and bind-over proceedings in district court.

*See Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (*3d ed*) (MJI, 2004), Section 4.9 on modification.

Unless it is modified, rescinded, or expired, the district court's conditional release order in a felony case continues in effect after the defendant has been bound over to circuit court.* MCL 780.66(3). To expedite enforcement, however, circuit courts may take steps to update the information in the LEIN system after bind-over, so that law enforcement agencies will have no questions about the status of the case in the event that the defendant violates a release condition. The circuit court can continue or modify the district court's release order at arraignment, making it an order of the circuit court.

*MCL 771.3(5).

After a defendant's conviction, the court may incorporate the pretrial release conditions into orders of probation. MCL 771.3(2)(o) authorizes the issuance of probation orders with "conditions reasonably necessary for the protection of 1 or more named persons." Probation orders containing such conditions are entered into the LEIN system.* Some courts give a copy of the probation order to the protected individual to show to police officers in the event of a violation. See Section 8.8 for more discussion of probation orders.

E. Conditional Pretrial Release Orders and Concurrent Domestic Relations Proceedings

No Michigan statute or court rule addresses the precedence of court orders issued in concurrent criminal and domestic relations proceedings. In situations with concurrent proceedings, it is helpful to consider that criminal court orders — especially those with "no-contact" or similar protective provisions — address serious public safety concerns. To promote safety, the Advisory Committee for this resource book recommends that courts in domestic relations cases abide by criminal court orders unless they are presented with facts showing that it would be dangerous to do so.

It is thus imperative for a domestic relations court to take steps to obtain information about the existence and contents of pretrial release orders that govern the interactions of the parties before them. Of particular importance are orders with "no-contact" provisions, and orders prohibiting a defendant from entering specified premises or assaulting, beating, molesting, or wounding a named person. Unawareness of such provisions in a pretrial release order may cause a domestic relations court to unwittingly orchestrate a dangerous encounter; for example, a court may order parties to appear together for a conciliation or settlement conference despite a provision prohibiting such contact in a criminal court order.

Lack of information about concurrent criminal court proceedings can also lead to conflicting orders; for example, a domestic relations court that is unaware of a "no-contact" provision in a criminal pretrial release order may issue an order for parenting time that requires the parties to come into contact to exchange a child. Situations like this cause confusion for the parties and for police officers who may be called upon to enforce the "no-contact" order. Such confusion offers domestic violence perpetrators the opportunity to continue the abuse without being held accountable. It may also prevent police officers from adequately assessing the danger that is present at the scene of a domestic violence call.

> **Note:** In some jurisdictions, police officers who have encountered conflicting orders are encouraged to contact the issuing courts to make them aware of the problem.

In contrast, if a domestic relations court knows about a criminal "no-contact" order, it can tailor its parenting time orders to avoid prohibited contact between the parties. If a criminal "no-contact" order is issued after an order for parenting time, the Advisory Committee for this resource book recommends that the defendant be advised to abide by the criminal court order. The defendant should also seek modification of the parenting time order to accommodate the "no-contact" provision in the criminal court order.*

*See Section 4.6(B) on safe terms for parenting time.

The issue of support may also arise concurrently in criminal pretrial release proceedings and in domestic relations proceedings. Domestic abusers often exert control over their victims by manipulating the couple's finances.* It is thus not uncommon for an abuser excluded from premises under a pretrial release order to assert control by refusing to make mortgage, utility, or other payments necessary to support the victim and children who remain on the

*See Section 1.6 for a discussion of abusive tactics.

premises. Although questions of family support are typically addressed in domestic relations proceedings in family court, financial abuse is a crime that can be as harmful as physical assault:

- MCL 750.161(1) provides that "a person who being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse or his or her children under 17 years of age, is guilty of a felony, punishable by imprisonment in a state correctional facility for not less than 1 year and not more than 3 years, or by imprisonment in the county jail for not less than 3 months and not more than 1 year."

- MCL 750.165(1) states: "If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both." A person may not be liable under this statute unless he or she "appeared in, or received notice by personal service of, the action in which the support order was issued." MCL 750.165(2).

- MCL 750.167 and MCL 750.168 provide that "[a] person of sufficient ability who refuses or neglects to support his or her family" is a "disorderly person" subject to misdemeanor sanctions.

- MCL 750.136b(3)(a) and (6) impose criminal sanctions for "omissions" that cause a child physical harm or serious mental harm. "Omissions" are defined as a "willful failure to provide the food, clothing, or shelter necessary for a child's welfare or the willful abandonment of a child." MCL 750.136b(1)(c). This statute applies to a child's parent or guardian, or to any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person. MCL 750.136b(1)(d).

Because all pretrial release orders prohibit defendants from committing any crime while released on bond (MCR 6.106(D)(1)), a defendant's failure to support his or her family can result in sanctions in the criminal case that may be imposed concurrently with related actions in the domestic relations court. As is the case with "no-contact" provisions, domestic relations courts need to take steps to inform themselves about issues of support that arise in concurrent criminal cases to avoid the confusion caused by conflicting court actions.

8.8 Probation Orders

This section addresses probation orders, which courts typically impose as part of a defendant's sentence upon conviction of a crime.*

*Courts also impose probation conditions as part of "deferred proceedings," in which the court postpones entry of a conviction after a finding of guilt. See Section 8.9.

A. Issuing Probation Orders

If a court has found a criminal defendant guilty of a felony or misdemeanor other than murder, treason, criminal sexual conduct in the first or third degree, armed robbery, and certain major controlled substance offenses, it may place the defendant on probation if it determines that:

> "[t]he defendant is not likely again to engage in an offensive or criminal course of conduct and that the public good does not require that the defendant suffer the penalty imposed by law . . . ." MCL 771.1(1).

The duration of a probation order is at the sentencing court's discretion, subject to the following limitations set forth in MCL 771.2(1):

- If the defendant is convicted for an offense that is not a felony, the probation period shall not exceed two years.
- If the defendant is convicted of a felony other than a major controlled substance offense (defined in MCL 761.2), the probation period shall not exceed five years.

The foregoing limitations on probationary periods do not apply to cases of misdemeanor stalking or aggravated stalking. MCL 771.2a(1)–(2). See Section 8.4(A)(2), (B)(2) for a discussion of the probationary periods for stalking offenses.

B. Contents of Probation Orders and Their Significance in Domestic Relations Actions

Under MCL 771.3(1), probation orders must include the following conditions:

- The probationer shall not violate any criminal law of any jurisdiction in the U.S. during the term of probation.
- The probationer shall not leave the state without the court's consent during the term of probation.
- The probationer shall report to the probation officer, either in person or in writing, monthly or as required by the officer.
- The probationer shall pay certain fees listed in the statute, which include restitution to the victim or the victim's estate.
- The probationer shall comply with the Sex Offenders Registration Act, MCL 28.721–28.732, if registration under the act is required.

Additionally, criminal courts have discretion to impose one or more conditions listed in MCL 771.3(2). Some of these conditions include:

- Imprisonment up to 12 months in the county jail.
- Payment of a fine and/or costs; payment may be made by wage assignment.
- Performance of community service.
- Payment of restitution to the victim; payment may be made by wage assignment.
- Participation in substance abuse or mental health treatment or counseling.
- Participation in a community corrections program.
- House arrest.
- Electronic monitoring.
- Any conditions reasonably necessary for the protection of one or more named persons.

Probation conditions for the protection of named persons are of particular importance in cases involving domestic violence. Domestic violence victims are more at risk from re-offense than are victims of stranger violence because of the offender's greater access to the domestic violence victim. Moreover, the dynamic of control over the victim that motivates acts of domestic violence makes re-offense more likely. Some offenders resort to violence even after a criminal conviction in order to regain the control that was lost as a result of the court's intervention.

Probation conditions for the protection of named persons are entered into the LEIN. MCL 771.3(5). Upon violation of a probation condition, the offender is subject to warrantless arrest. MCL 764.15(1)(g). An individual who violates a condition of probation is subject to revocation of probation in the court's discretion. MCL 771.4 and MCR 6.445(G).

There is no Michigan statute or court rule addressing situations with concurrent probation and domestic relations orders. In situations with concurrent proceedings, it is helpful to consider that criminal court orders — especially those with "no-contact" or similar protective provisions — address serious public safety concerns. To promote safety, the Advisory Committee for this resource book recommends that courts in domestic relations cases abide by criminal court orders unless they are presented with facts showing that it would be dangerous to do so.

Accordingly, domestic relations courts need to obtain information about the existence and contents of probation orders that govern the interactions of the parties before them, especially probation orders containing provisions for the protection of one of the parties to the domestic relations action. Unawareness of such provisions may cause a domestic relations court to unwittingly orchestrate a dangerous encounter; for example, a court may order parties to

appear together for a conciliation or settlement conference despite a provision that prohibits such contact in a probation order issued by a criminal court.

Lack of information about criminal court proceedings can also lead to conflicting orders. If a domestic relations court is unaware of a probation order protecting a party to the domestic relations action, it may issue an order for parenting time that requires the parties to engage in activities that violate the probation order. Situations like this cause confusion for the parties and for police officers who may be called upon to enforce the probation order. Such confusion offers domestic violence perpetrators the opportunity to continue the abuse without being held accountable. It may also prevent police officers from adequately assessing the danger that is present at the scene of a domestic violence call.

> **Note:** In some jurisdictions, police officers who have encountered conflicting orders are encouraged to contact the issuing courts to make them aware of the problem.

In contrast, if a domestic relations court knows about a "no-contact" provision in a probation order, it can tailor its parenting time orders to avoid prohibited contact between the parties. If a probation order with a "no-contact" provision is issued after an order for parenting time, the Advisory Committee for this resource book recommends that the probationer be advised to abide by the probation order. The probationer should also seek modification of the parenting time order to accommodate the "no-contact" provision in the probation order.*

*See Section 4.6(B) on safe terms for parenting time.

The issue of support may also arise concurrently in probation and domestic relations proceedings. Domestic abusers often exert control over their victims by manipulating the couple's finances.* Accordingly, an abuser whose contact with a victim is restricted by a probation order may attempt to reassert control by refusing to make mortgage, utility, or other payments necessary to support the victim and the children of the relationship. Although questions of family support are typically addressed in domestic relations proceedings in family court, financial abuse is a crime that can be as harmful as physical assault:

*See Section 1.6 for a discussion of abusive tactics.

- MCL 750.161(1) provides that "a person who being of sufficient ability fails, neglects, or refuses to provide necessary and proper shelter, food, care, and clothing for his or her spouse or his or her children under 17 years of age, is guilty of a felony, punishable by imprisonment in a state correctional facility for not less than 1 year and not more than 3 years, or by imprisonment in the county jail for not less than 3 months and not more than 1 year."

- MCL 750.165(1) states: "If the court orders an individual to pay support for the individual's former or current spouse, or for a child of the individual, and the individual does not pay the support in the amount or the time stated in the order, the individual is guilty of a felony punishable by imprisonment for not more than 4 years or by a fine of not more than $2,000.00, or both." A person may not be liable under this statute unless he or she "appeared in, or received notice by personal service of, the action in which the support order was issued." MCL 750.165(2).

- MCL 750.167 and MCL 750.168 provide that "[a] person of sufficient ability who refuses or neglects to support his or her family" is a "disorderly person" subject to misdemeanor sanctions.

- MCL 750.136b(3)(a) and (6) impose criminal sanctions for "omissions" that cause a child physical harm or serious mental harm. "Omissions" are defined as a "willful failure to provide the food, clothing, or shelter necessary for a child's welfare or the willful abandonment of a child." MCL 750.136b(1)(c). This statute applies to a child's parent or guardian, or to any other person who cares for, has custody of, or has authority over a child regardless of the length of time that a child is cared for, in the custody of, or subject to the authority of that person. MCL 750.136b(1)(d).

Because all probation orders prohibit probationers from committing any crime while on probation (MCL 771.3(1)(a)), a probationer's failure to support his or her family can result in sanctions that may be imposed concurrently with related actions in the domestic relations court. As is the case with provisions protecting a named person, domestic relations courts need to take steps to inform themselves about issues of support that arise in concurrent criminal cases to avoid the confusion caused by conflicting court actions.

> **Note:** Although a court's probation order is a matter of public record, all records and reports or investigations made by a probation officer (including presentence investigation and alcohol assessment reports), and all case histories of probationers are privileged or confidential communications not open to public inspection — only judges and probation officers have access to a probationer's records, reports, and case histories. Moreover, a confidential relationship exists between a probation officer and a probationer or defendant under investigation. MCL 791.229. See also MCL 771.14(5). ("The court shall permit the prosecutor, the defense attorney, and the defendant to review the presentence investigation report before sentencing") and *Michigan Trial Court Case File Management Standards*, Component 19 (State Court Administrative Office, 1999).

8.9 Deferred Proceedings

A. Deferred Proceedings in General

*See Section 8.8 on probation conditions generally.

For a few criminal offenses, the Michigan Legislature has provided for "deferred proceedings," in which a court may postpone a judgment of guilt against a defendant. Defendants eligible for deferred proceedings are generally first-time offenders who have been found guilty after a trial or guilty plea of an offense listed in one of Michigan's deferral statutes. If the court grants a defendant's request for a deferral, it places the defendant on probation with appropriate terms and conditions* and postpones its judgment of guilt. If the defendant fails to comply with the terms and conditions of probation, the court may terminate the deferred proceedings and enter a judgment of guilt and conviction. The judgment of conviction and related court records will then become a matter of public record. If the defendant successfully

completes probation, however, the court will discharge the defendant and dismiss the proceedings without entering a conviction on the defendant's record. In this case, the Department of State Police will keep a nonpublic record of the dismissal. A defendant can only be discharged and dismissed *once* under each deferral statute.

Deferred proceedings are available for offenders charged with the following crimes:

- Domestic assault and battery or aggravated domestic assault. MCL 769.4a.
- Parental kidnapping. MCL 750.350a(4).
- Use or possession of a controlled substance. MCL 333.7411.

Additionally, deferred proceedings are available for most criminal defendants age 17 or older and under 21, under the Holmes Youthful Trainee Act, MCL 762.11, et seq. (Life-offense felonies, major controlled substance offenses and traffic offenses are excepted from the Act.)

This section will provide more detailed information about the deferral statutes governing domestic assault and parental kidnapping. Deferred proceedings under the Controlled Substances Act and the Holmes Youthful Trainee Act are beyond the scope of this resource book.

B. Deferred Proceedings Under the Domestic Assault Statutes

An offender who is found guilty of, or pleads guilty to, a violation of MCL 750.81, MCL 750.81a, or a local ordinance substantially corresponding to MCL 750.81, may be eligible for deferred proceedings under MCL 769.4a.* In order for the offender to be eligible, one of the following must apply:

*See Sections 8.2 and 8.3 on the elements of the listed offenses.

- The victim is the assailant's spouse or former spouse.
- The victim has had a child in common with the assailant.
- The victim has or has had a dating relationship with the assailant. A "dating relationship" means "frequent, intimate associations primarily characterized by the expectation of affectional involvement." A "dating relationship" does not include a casual relationship or ordinary fraternization between two individuals in a business or social context. MCL 769.4a(1).
- The victim is a resident or former resident of the same household as the assailant. See Section 8.2(A) for a discussion of who is included as a resident of the same household.

MCL 769.4a allows the court to place the defendant on probation after a finding of guilt, without entering judgment. If the defendant subsequently violates a condition of probation, the court may enter an adjudication of guilt and impose sentence — in certain cases the court is required to do so. If the offender fulfills the conditions of probation, the court must discharge him or

her and dismiss the proceedings without an adjudication of guilt. This discharge and dismissal does not operate as a conviction for purposes of MCL 769.4a or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. An individual may be discharged and dismissed only *one time* under the deferral statute. The Department of State Police is charged with keeping nonpublic records of proceedings under the statute to ensure that repeat offenders do not benefit from multiple deferrals.

Deferred proceedings under MCL 769.4a are authorized *only* if the following criteria are met:

- The defendant has no previous conviction under MCL 750.81 (assault or assault and battery), MCL 750.81a (assault and infliction of serious injury) or any local ordinance* substantially corresponding to MCL 750.81.
- The defendant consents to deferred proceedings.
- The prosecuting attorney, in consultation with the victim, consents to deferred proceedings.

*Ordinance violations may be difficult to track because they are not always reported to the state police. See Lovik, *Domestic Violence: A Guide to Civil & Criminal Proceedings* (*3d ed*) (MJI, 2004), Section 2.6.

Before ordering deferred proceedings in cases meeting the above criteria, the court must first contact the Department of State Police to determine whether the defendant has previously been convicted under MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81, or has previously availed himself or herself of proceedings under the deferral statute. If State Police records indicate that a defendant was previously arrested for a violation of MCL 750.81, MCL 750.81a, or any local ordinance substantially corresponding to MCL 750.81, but that there was no disposition, the court must contact the arresting agency and the court that had jurisdiction over the violation to determine the disposition of the arrest.

Orders of probation under MCL 769.4a(3) may require the defendant to participate in a "mandatory counseling program," and to pay the costs of this program. For more information on batterer intervention services, see Sections 3.3–3.4. A general discussion of conditions of probation that a court may order is found at Section 8.8.

Upon a violation of a term or condition of probation, the court has discretion to enter a judgment of guilt and impose sentence. MCL 769.4a(2). However, MCL 769.4a(4) *requires* the court to enter a judgment of guilt and proceed to sentencing if any of the following circumstances exist:

- The accused violates an order of the court that he or she receive counseling regarding his or her violent behavior.
- The accused violates an order of the court that he or she have no contact with a named individual.
- The accused commits an assaultive crime during the period of probation. An "assaultive crime" means a violation of one or more of the following:
  - Assaults under MCL 750.81.

- Assault and infliction of serious injury under MCL 750.81a.
- Threats or assault against an FIA employee under MCL 750.81c.
- Assault, battering, resisting, obstructing, or opposing a person performing his or her duty under MCL 750.81d.
- Felonious assault under MCL 750.82.
- Assault with intent to commit murder under MCL 750.83.
- Assault with intent to do great bodily harm less than murder under MCL 750.84.
- Assault with intent to maim under MCL 750.86.
- Assault with intent to commit a felony under MCL 750.87.
- Unarmed assault with intent to rob and steal under MCL 750.88.
- Armed assault with intent to rob and steal under MCL 750.89.
- Sexual intercourse under pretext of medical treatment under MCL 750.90.
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual under MCL 750.90a.
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual and the conduct results in a miscarriage or stillbirth under MCL 750.90b(a).
- Person intentionally commits conduct proscribed under MCL 750.81 to 750.89 against a pregnant individual and the conduct results in great bodily harm to the embryo or fetus under MCL 750.90b(b).
- Gross negligence against a pregnant individual under MCL 750.90c.
- Operating a vehicle while impaired or while under the influence of intoxicating liquors resulting in an accident with a pregnant individual under MCL 750.90d.
- Conduct as proximate cause of accident involving pregnant individual under MCL 750.90e.
- Infant Protection Act under MCL 750.90g.
- Attempt to murder under MCL 750.91.
- Explosives; common carriers for passengers; transportation under MCL 750.200.
- Manufacture, delivery, possession, transport, placement, use, or release of chemical irritant, chemical irritant device, smoke device, or an imitation device or substance under MCL 750.200j.
- Acts causing false belief or exposure under MCL 750.200*l*.

- Explosives exploded by concussion or friction under MCL 750.201.
- Marking of explosives intended for shipment under MCL 750.202.
- Sending explosives with intent to kill or injure persons or damage property under MCL 750.204.
- Representing or presenting a device as an explosive, incendiary device, or bomb under MCL 750.204a.
- Placing explosive substances with the intent to destroy and cause injury to any person under MCL 750.207.
- Placing an offensive or injurious substance with intent to injure, coerce, or interfere with a person or property under MCL 750.209.
- Possession of explosive substance or device in a public place under MCL 750.209a.
- Possession of a substance that when combined will become explosive or combustible with the intent to use unlawfully under MCL 750.210.
- Possession, sale, purchase, or transport of valerium under MCL 750. 210a.
- Possession of a device designated to explode upon impact, upon application of heat or a highly incendiary device with intent or use unlawfully under MCL 750.211a.
- Manufacture or sale of any highly explosive which is not marked under MCL 750.212.
- First-degree murder under MCL 750.316.
- Second-degree murder under MCL 750.317.
- Manslaughter under MCL 750.321.
- Kidnapping under MCL 750.349.
- A prisoner taking another as a hostage under MCL 750.349a.
- Kidnapping a child under age 14 under MCL 750.350.
- Mayhem under MCL 750.397.
- First-degree criminal sexual conduct under MCL 750.520b.
- Second-degree criminal sexual conduct under MCL 750.520c.
- Third-degree criminal sexual conduct under MCL 750.520d.
- Fourth-degree criminal sexual conduct under MCL 750.520e.
- Assault with intent to commit criminal sexual conduct under MCL 750.520g.
- Armed robbery; aggravated assault under MCL 750.529.

- Carjacking under MCL 750.529a.
- Unarmed robbery under MCL 750.530.
- Terrorism under MCL 750.543f.
- Hindering the prosecution of terrorism under MCL 750.543h.
- Providing material support for terrorist acts or soliciting material support for terrorism under MCL 750.543k.
- Making a terrorist threat or false report of terrorism under MCL 750.543m.
- Unlawful use of the internet, telecommunications, or electronic device to disrupt the functions of the public safety, educational, commercial, or governmental operations under MCL 750.543p.
- Obtaining or possessing certain information about a vulnerable target under MCL 750.543r.

Note: Domestic violence may occur as an abusive pattern that tends to escalate over time. MCL 769.4a is intended to intervene in abusive behavior during its early stages by offering the offender an incentive to seek assistance in changing his or her behavior before it escalates to a more dangerous level. For this reason, the statute's provisions for deferred sentencing are inappropriate for multiple offenders, or for offenders who are at risk for committing serious violence acts. See Section 1.5(B) for a discussion of lethality factors.

C. Deferred Sentencing in Parental Kidnapping Cases

Under MCL 750.350a(4), the court may defer imposition of sentence if a person found guilty of violating the parental kidnapping* statute meets the following criteria:

*The elements of parental kidnapping are discussed at Section 8.5(A).

- The defendant must not have previously been convicted of violating the parental kidnapping statute, the general kidnapping statute (MCL 750.349), or the statute governing kidnapping of children under 14. (MCL 750.350).
- The defendant must not have been previously convicted of violating any statute of the United States or any state related to kidnapping.

If there are no prior disqualifying convictions and the defendant consents, the court may place the defendant on probation "with lawful terms and conditions" without entering a judgment of guilt. If the defendant violates a condition of probation, the court has discretion to enter a judgment of guilt and proceed to sentencing. If the defendant fulfills the terms and conditions of probation, however, the court must dismiss the proceedings without an adjudication of guilt. The defendant's discharge and dismissal under this provision do not operate as a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including any additional penalties imposed for second or subsequent convictions.

To prevent repeat offenders from being sentenced under the deferred proceedings option, MCL 750.350a(4) requires the Department of State Police to keep a nonpublic record of arrests and discharges and dismissals under the parental kidnapping statute. When requested, the Department must furnish this record to a court or police agency to show whether a defendant in a criminal action has already been subject to deferred proceedings. It is thus important for courts to communicate with the State Police about parental kidnapping proceedings to prevent multiple offenders from improperly receiving deferrals. Courts can prevent improper deferrals by:

- Requesting records of prior disqualifying proceedings before deferring adjudications of guilt and sentence under the parental kidnapping statute; and
- Reporting discharges and dismissals entered under the statute to the Department of State Police so that it can provide this information in later cases that may arise.